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In the Supreme Court of the United States

OCTOBER TERM, 1974

WILLIE JOHNSON, JR., PETITIONER

v.

RAILWAY EXPRESS AGENCY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This submission is made in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

OPINIONS BELOW

The opinion of the district court (Pet. App. 6a-12a) is not officially reported. The opinion of the court of appeals (Pet. App. 13a-21a) is reported at 489 F. 2d 525. The opinion of the court of appeals denying rehearing (Pet. App. 22a-26a) is reported at 489 F. 2d 530.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1973, and a petition for rehearing

was denied on January 15, 1974. The petition for a writ of certiorari was filed on April 15, 1974 and was granted on June 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the running of the period of limitation for bringing an action for employment discrimination under 42 U.S.C. 1981 is tolled by filing with the Equal Employment Opportunity Commission a charge of unlawful employment practice based upon the same factual allegations.

STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, as amended, 42 U.S.C. 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 706 of the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. (1970 ed.) 2000e–5, provided in pertinent part:[1]

[1] Section 706 was amended, in ways not directly relevant to this litigation, by Section 4 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 104.

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. * * *
>
> * * * * * *
>
> (e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1)

by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

STATEMENT

In May 1967 petitioner, a black man, filed a charge with the Equal Employment Opportunity Commission alleging that his employer, respondent Railway Express Agency, Inc., discriminated on the basis of race in its hiring, assignment, training, transfer, and promotion practices, and that respondents Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local maintained racially segregated local unions, all in violation of Title VII of the Civil Rights Act of 1964 (Pet. 5–6). Railway Express terminated petitioner's employment the following month (Pet. 6). Petitioner then

amended his charge to include an allegation of discriminatory discharge (*ibid.*).

In December 1967 the Commission filed a report concluding that Railway Express and the local unions had engaged in discriminatory practices, and in March 1970 the Commission issued a decision finding reasonable cause to believe petitioner's charges (*ibid.*). The Commission's conciliation efforts failed to bring respondents into voluntary compliance with Title VII, and in January 1971 the Commission accordingly issued petitioner notice of his right to institute a civil action against respondents within 30 days (*ibid.*).[2]

Within 30 days of receipt of that notice, petitioner brought suit against respondents in the United States District Court for the Western District of Tennessee, alleging violations of Title VII and also of 42 U.S.C. 1981, and requesting injunctive relief. Respondents moved to dismiss and for summary judgment. In June 1971 the district court dismissed the Section 1981 claims against all three respondents, on the ground that those claims were barred by the one-year Tennessee statute of limitations; the court further granted the local unions' motions for summary judgment as to the Title VII claims against them on the basis of stipulated or undisputed facts (Pet. App. 1a–3a). The court did not, however, direct entry of final judgment pursuant to Rule 54(b), Fed. R. Civ. P.

Petitioner's court-appointed attorney subsequently withdrew from the case with the permission of the court, and petitioner was allowed 30 days to obtain

[2] The statute now grants 90 days within which to bring the action after issuance of the notice. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f)(1).

other counsel (Pet. 8). Petitioner was unable to do so, and in February 1972 the court, without referring to its June 1971 order, entered judgment dismissing petitioner's "action" without prejudice (Pet. App. 4a–5a). Neither petitioner nor respondents sought review of the February 1972 order.

Petitioner brought this suit for injunctive relief three months later in the same district court, repeating all the allegations of his initial complaint (App. 4a–13a). Respondents pleaded the June 1971 order as *res judicata* and further contended that since Section 706 of the Civil Rights Act of 1964 required Title VII claims to be filed within 30 days of the issuance of the notice of right to sue and petitioner had failed to institute his second action within 30 days of the dismissal of his first, the district court lacked jurisdiction over petitioner's reasserted Title VII claims (App. 52a–57a, 94a–95a). The district court dismissed all claims against the local unions on *res judicata* grounds (Pet. App. 9a). The court further held that the Section 1981 claim against Railway Express was barred by the one-year statute of limitations (Pet. App. 10a) and that petitioner's failure to reinstitute his civil action within 30 days had deprived the court of jurisdiction over his Title VII claims (Pet. App. 10a–12a).

The court of appeals, without addressing respondent's *res judicata* contentions,[3] affirmed on the grounds

[3] The local unions, but not Railway Express, assert *res judicata* here as an alternative ground for affirming the judgment below (Unions Br. 11–12). We take no position on the merits of that contention. We note, however, that since the *res judicata* issue was not decided by the court of appeals, this Court could remand for consideration of that issue if the tolling question is decided in petitioner's favor.

that petitioner's Section 1981 claims against all respondents were barred by the statute of limitations and that the district court had lacked jurisdiction over petitioner's reasserted Title VII claims (Pet. App. 13a–21a).

In its opinion denying rehearing, the court of appeals specifically rejected petitioner's contention that the filing of his Title VII charges with the Commission had tolled the running of the period of limitations with respect to his Section 1981 claims (Pet. App. 25a–26a). This Court granted the petition for a writ of certiorari to consider that contention.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner's Section 1981 claims allege that respondents committed racially discriminatory acts of a continuing nature during and prior to June 1967 (App. 5a–6a). Since the federal statute prescribes no period of limitation for such claims, the applicable limitation period is that which would under state law apply to the most closely analogous state action. See, *e.g.*, *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (C.A. 5); *Madison* v. *Wood*, 410 F. 2d 564 (C.A. 6). Cf. *O'Sullivan* v. *Felix*, 233 U.S. 318; *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 703–704. Applying that principle to this case, the courts below determined (Pet. App. 10a, 20a) that the relevant period of limitation was the one-year period prescribed by Tenn. Code Ann., Section 28–304. This Court denied petitioner's request for review of that determination by limiting

the grant of certiorari. Accordingly, unless, as petitioner contends, the running of the period of limitation was tolled by the filing of his Title VII charges with the Commission, his Section 1981 claims were barred after June 1968.

"Tolling" normally has the effect of suspending the operation of a statute of limitations during the pendency of an event or condition. See *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 560–561. Petitioner filed his Title VII charges with the Commission in May 1967 (Pet. 5–6), but he did not receive notice of his right to sue until January 1971 (Pet. 6). If the filing of those charges tolled the running of the period of limitation, petitioner was entitled to bring suit under Section 1981 any time prior to January 1972. He in fact brought suit in February 1971 (Pet. 6).

Petitioner's initial action was dismissed without prejudice in February 1972 (Pet. App. 4a–5a), by which time the statute of limitations, even if tolled, had run.[4] However, the state savings statute permits actions to be reinstituted within one year of a dismissal without prejudice (Tenn. Code Ann., Section 28–106), and petitioner's second civil action was timely under that statute, which presumably governs the Section 1981 claim. See 28 U.S.C. 1652; 42 U.S.C. 1988.[5]

[4] Petitioner has suggested (Pet. 11, n. 8) that the institution of the first action itself tolled the running of the limitation period as to the second action. However, petitioner did not present that question in his petition for a writ of certiorari and it is not now before the Court.

[5] The court of appeals held (Pet. App. 23a–24a) that the state savings statute did not apply to petitioner's Title VII claims, on the ground that 42 U.S.C. (1970 ed.) 2000e–5(d), which required such claims to be instituted within 30 days of the issuance of a notice of right to sue, by necessary implication required dismissed claims to be reinstituted within 30 days of dismissal; this Court denied petitioner's request for review of that determination. But respondents do not contend that the 30-day provision, rather than the state savings statute, applies to the reinstitution of petitioner's Section 1981 claims. See *Moore* v. *Fields*, 464 F. 2d 549 (C.A. 6). Respondents rest their case on *res judicata* (see note 3, *supra*) and the untimeliness of the original action.

Our submission is that the tolling principle is applicable here. We reach that conclusion by considering both the congressional purpose behind Title VII and the policy underlying statutes of limitations. The burden of our argument is that tolling the time allowed for filing a Section 1981 suit while the Equal Employment Opportunity Commission is attempting to conciliate the dispute (1) serves the congressional objective of discouraging (without prohibiting) premature judicial intervention, and (2) does so without offending the policies underlying statutory limitations periods.

ARGUMENT

A. THE CONGRESSIONAL PURPOSE IS EFFECTUATED BY PERMITTING AN INDIVIDUAL AGGRIEVED BY EMPLOYMENT DISCRIMINATION TO DELAY BRINGING SUIT UNDER SECTION 1981 UNTIL AFTER ISSUANCE OF THE NOTICE OF HIS RIGHT TO SUE UNDER TITLE VII

1. AN INDIVIDUAL AGGRIEVED BY EMPLOYMENT DISCRIMINATION MAY REASONABLY DESIRE TO ASSERT CLAIMS FOR RELIEF UNDER BOTH SECTION 1981 AND TITLE VII

Title VII of the Civil Rights Act of 1964 was enacted by Congress "to assure equality of employment op-

portunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44. Title VII both creates statutory rights against invidious discrimination and establishes a comprehensive scheme for the vindication of those rights.

An individual aggrieved by employment discrimination is entitled under Title VII to bring charges of unfair employment practice to the Equal Employment Opportunity Commission, which is vested with the "authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge." *Ibid.* If the Commission fails to obtain voluntary compliance and decides not to bring suit on behalf of the claimant, the claimant may do so himself. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792. The federal district courts are empowered to appoint counsel for plaintiffs alleging discrimination, authorize the commencement of the action without the payment of fees, costs, or security, and grant attorneys' fees in meritorious cases. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(e) and (k). Where unlawful discrimination is proven, the courts may award back pay and "order such affirmative action as may be appropriate." 42 U.S.C. (1970 ed., Supp. II) 2000e–5(g). Back pay may not, however, be awarded for a period more than two years prior to the filing of charges with the Commission. *Ibid.* Several courts have also concluded that neither compensatory nor punitive

damages are available under Title VII. See, *e.g.*, *Loo* v. *Gerarge*, 374 F. Supp. 1338 (D. Ha.); *Howard* v. *Lockheed-Georgia Co.*, 372 F. Supp. 854 (N.D. Ga.); *Van Hoomissen* v. *Xerox Corporation*, 368 F. Supp. 829 (N.D. Cal.). But see *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich.), appeal pending; *Humphrey* v. *Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex.), reversed on other grounds, 488 F. 2d 691 (C.A. 5).

Although Title VII was designed as a comprehensive solution to the problem of invidious employment discrimination, Congress intended individuals aggrieved by such discrimination to have available parallel or overlapping remedies; such individuals are not limited to seeking relief only under Title VII. "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48. In particular, Congress understood "that the remedies available to the individual under Title VII are coextensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H. Rep. No. 238, 92d Cong., 1st Sess., p. 19. See also S. Rep. 415, 92d Cong., 1st Sess., p. 24. Indeed, in considering the Equal Employment Opportunity Act of 1972 the Senate specifically rejected an amendment that would have deprived employees aggrieved by racial discrimination of their right to sue under Section 1981. See 118 Cong. Rec. 3371–3373 (1972). Con

gress therefore clearly intended that such employees should be permitted to pursue their rights under both Title VII and Section 1981. Cf. *Jones* v. *Alfred Mayer Co.*, 392 U.S. 409, 413–417.[6]

Section 1981 grants to all persons the right to be free of racial discrimination in the making and enforcement of contracts. Individuals who establish a cause of action under Section 1981 are entitled to both legal and equitable relief, including compensatory and, in some circumstances, punitive damages. See, *e.g.*, *Caperci* v. *Huntoon*, 397 F. 2d 799 (C.A. 1), certiorari denied, 393 U.S. 940; *Mansell* v. *Saunders*, 372 F. 2d 573 (C.A. 5). Cf. *Jones* v. *Alfred Mayer Co.*, *supra*, 392 U.S. at 414–415, n. 14. An award of compensatory

[6] Though this Court has never expressly held that Section 1981 bars private contractual discrimination, *Jones* v. *Alfred Mayer Co.*, *supra*, 392 U.S. at 413, held that Section 1982, the related provision barring housing discrimination, prohibits "*all* racial discrimination, private as well as public," and intimated that Section 1981 has a like coverage. See 392 U.S. at 441–443, n. 78. Applying the reasoning of that decision, the courts of appeals have unanimously concluded that Section 1981, derived like Section 1982 from Section 1 of the Civil Rights Act of 1866, prohibits employment discrimination on the basis of race. See, *e.g.*, *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2); *Young* v. *International Telephone & Telegraph Co.*, 438 F. 2d 757 (C.A. 3); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377 (C.A. 4), certiorari denied, 409 U.S. 982; *Caldwell* v. *National Brewing Co.*, 443 F. 2d 1044 (C.A. 5), certiorari denied, 405 U.S. 916; *Long* v. *Ford Motor Co.*, 496 F. 2d 500 (C.A. 6); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F. 2d 476 (C.A. 7), certiorari denied, 400 U.S. 911; *Brady* v. *Bristol-Meyers, Inc.*, 459 F. 2d 621 (C.A. 8); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (C.A.D.C.). Respondents do not challenge those decisions here, and therefore the question of the scope of Section 1981 is not before the Court.

back pay under Section 1981 is not subject to the two-year limitation imposed upon recoveries under Title VII.

Section 1981 and Title VII are not coextensive in their coverage. Certain employers are excluded from the coverage of Title VII. See 42 U.S.C. 2000e(b). Section 1981 contains no express exclusions. Title VII applies only to employment relationships; Section 1981 protects all contractual relationships. On the other hand, Title VII expressly bars discrimination on the basis of sex, religion, and national origin, whereas some courts have concluded that the prohibitions of Section 1981 do not extend to all those forms of discrimination. See, *e.g.*, *Willingham* v. *Macon Telephone Publishing Co.*, 482 F. 2d 535 (C.A. 5), rehearing *en banc* granted, 482 F. 2d 542. But see *Guerra* v. *Manchester Terminal Corp.*, No. 73–1907 (C.A. 5), decided July 31, 1974; *Baker* v. *Chicago, Fire and Burglary Detection, Inc.*, 489 F. 2d 953 (C.A. 7). Cf. *Pierce* v. *United States*, 146 F. 2d 84 (C.A. 5).

Title VII also offers the aggrieved individual special assistance—*e.g.*, investigations, conciliation machinery, legal counsel, waiver of court costs, and attorneys' fees—unavailable under Section 1981. But for individuals alleging that employers covered by Title VII have discriminated against them on the basis of race, the substantive protections of the two statutes are quite similar. The principal remedial difference is that punitive damages and more ample back pay may be awarded under Section 1981. This difference may,

however, in some instances be of substantial importance. Thus, where the aggrieved individual has apparently valid claims for back pay for a period more than two years prior to the filing of charges with the Commission or presents a case arguably appropriate for the award of punitive damages, he may reasonably desire to bring suit under Section 1981 as well as Title VII.

2. CONGRESS DID NOT INTEND TO COMPEL AN AGGRIEVED INDIVIDUAL TO SUE UNDER SECTION 1981 PRIOR TO COMPLETION OF THE COMMISSION'S EFFORTS TO OBTAIN VOLUNTARY COMPLIANCE

The legislative history referred to above (pp. 11–12, *supra*) shows a congressional intent that Section 1981 rights be immediately enforceable in court without prior resort to the administrative machinery established under Title VII. As Senator Clark, one of the leading proponents of the bill, explained to his colleagues, "[T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes." 110 Cong. Rec. 7207 (1964). Cf. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229. The courts of appeals have generally understood that the filing of Title VII charges is not a prerequisite to the initiation of an action under Section 1981. See *Young* v. *International Telephone & Telegraph Co., supra; Caldwell* v. *National Brewing Co., supra; Long* v. *Ford Motor Co., supra. Contra: Waters* v. *Wisconsin Steel Works of International Harvester Co., supra.* This approach

merely gives due recognition to the fact that Congress intended independent rights to be independently enforceable. See generally *Alexander* v. *Gardner-Denver Co., supra.*[7]

By the same token, however, Congress intended that judicial protection against employment discrimination normally would be invoked only upon the completion of the Commission's efforts to obtain voluntary compliance with Title VII. It was hoped that the elimination of employment discrimination on account of race would be achieved primarily through conciliation and persuasion. The premature initiation of private suits may in many instances frustrate that hope by interfering with the Commission's conciliation efforts. If, for example, the litigation fails for one reason or another, whether or not related to the merits, that would seriously weaken the Commission's ability to induce voluntary compliance. But even if the private plaintiff succeeds in obtaining full relief from discrimination against himself, final disposition

[7] We note that Title VII itself contemplates that some private suits for enforcement of Title VII rights may be brought while charges are still pending before the Commission. Thus Title VII claimants may in some instances be entitled to preliminary injunctive relief before the Commission takes any action with respect to their charges. *Drew* v. *Liberty Mutual Insurance Co.*, 480 F. 2d 69 (C.A. 5), certiorari denied, June 3, 1974, No. 73-312. Such claimants are also entitled to bring suit for back pay and permanent injunctive relief if the Commission does not obtain voluntary compliance within 180 days, even if conciliation efforts have not yet begun or are still under way. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f).

of the individual cause of action could tend to reduce the employer's incentive for voluntarily entering a more general conciliation agreement covering all employees and all forms of discrimination. To compel an aggrieved individual to sue under Section 1981 prior to completion of the Commission's efforts to obtain voluntary compliance would undercut Title VII's emphasis on conciliation, persuasion, and voluntary compliance.[8]

That is the effect of the holding below. State limitation periods for Section 1981 claims frequently are, as is true here, quite short. See, *e.g.*, *Henderson* v. *First National Bank of Montgomery*, 344 F. Supp. 1373 (M.D. Ala.). Because of its large backlog of cases and limited budget, the Commission often is unable to initiate compliance efforts within those limitation periods. See *Chromcraft Corp.* v. *Equal Employment Opportunity Commission*, 465 F. 2d 745 (C.A. 5). Accordingly, unless the running of the limitation period for filing Section 1981 claims is tolled during the pendency of unlawful employment practice charges before the Commission, many aggrieved individuals would be compelled to bring suit prematurely under Section

[8] It would be inappropriate to require the aggrieved individual to bring suit under Section 1981 prior to completion of conciliation efforts but then to stay or delay proceedings until the Commission acts. Such a requirement would simply create "a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts." *Crown Cork Front Co., Inc.* v. *United States*, 386 U.S. 503, 515.

1981, and thereby risk disruption of conciliation efforts, or to forego their rights under that statute.[9]

There is no basis in either Section 1981 or Title VII, or their respective legislative histories, for imposing such a Hobson's choice. Title VII's policy in favor of the voluntary resolution of employment discrimination claims should be accommodated by tolling the running of the limitation period applicable to Section 1981 claims during the pendency of charges before the Commission.[10]

[9] Respondent Railway Express contends (Railway Express Br. 7) that this case should be governed by the state tolling statute rather than by federal equitable tolling principles. But it is well settled that when federal courts sit to enforce federal rights, they have a duty to apply federal equity principles: "[w]hen Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395. See also *Movicolor Limited* v. *Eastman Kodak Company*, 288 F. 2d 80 (C.A. 2), certiorari denied, 368 U.S. 821.

[10] To be sure, it is arguable that the policy of encouraging conciliation and deferring judicial intervention until the mediation efforts of the Commission have failed could be served by merely *extending* the limitation period for bringing suit under Section 1981 to the last date on which suit may be brought under Title VII. Cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221. The result here would presumably be that petitioner's second suit would be barred as to the Section 1981 claim for the same reason that the Title VII claim was held out of time—that the state savings statute is inapplicable. See note 5, *supra*. In our view, however, there is no reason, in this context, to depart from the normal rule, which is that "tolling" entails a *suspension* of the period of limitation, thereby allowing the plaintiff whatever time remains under the applicable state statute, as well as the benefit of any savings statute.

B. THE RUNNING OF THE LIMITATION PERIOD FOR BRINGING SUIT UNDER SECTION 1981 WOULD SERVE NO PURPOSE DURING THE PENDENCY OF TIMELY TITLE VII CHARGES BASED UPON THE SAME FACTUAL ALLEGATIONS

The policies underlying statutory limitation periods would not be served by barring suits under Section 1981 for racially discriminatory employment pactices while charges based upon the same factual allegations are still pending before the Commission. The purpose of a statute of limitation is to protect defendants against the prejudice and unfair surprise that may attend the revival of stale claims. As this Court explained in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348–349:

> Statutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

These equitable considerations are not present when the plaintiff in an action under Section 1981 has previously filed timely Title VII charges based upon the same factual allegations. Such charges are required to be filed promptly, ordinarily within 180 days of the alleged discriminatory acts. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(e). The Commission in turn is required

to provide the employer with notice of the charges within 10 days after the date of filing. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(b). And the Commission's regulations provide that "the respondent employer shall preserve all personnel records relevant to the charge * * * until [its] final disposition * * *." 29 C.F.R. 1602.14(a). Thus the filing of timely Title VII charges promptly puts the employer on notice of a claim of unlawful discrimination and ensures that the employer will preserve all relevant evidence and thus substantially protect himself against the prejudice that might otherwise be suffered over the course of time.

Where a defendant is neither surprised nor prejudiced by delay in the institution of a civil action, the operation of a time bar acts merely as an arbitrary rule of convenience that serves no equitable purpose. Indeed, equitable considerations may be said to weigh in favor of a plaintiff who has made timely assertion of his rights in a manner that puts the defendant on notice and allows him to protect himself against prejudice.[11] This Court acknowledged the force of such equitable considerations in *American Pipe & Construction Co.* v. *Utah, supra,* and *Burnett* v. *New York Central R. Co.*, 380 U.S. 424. In *American Pipe,* the Court held that the initiation of a timely class action tolled the running of the limitation period

[11] Those equitable considerations presumably underlie state savings statutes, such as Tenn. Code Ann., Section 28–106, that permit an action to be reinstituted following a dismissal without prejudice after the limitation period has run. Where such statutes preserve the plaintiff's interests, recourse to the judiciary's equitable power to toll the running of the limitation period is unnecessary. But see note 12, *infra*.

as to individual members of the class, who were thereby enabled to institute separate actions after the district court held that the suit was inappropriate as a class action. Similarly, in *Burnett* the initiation of a timely Federal Employers' Liability Act suit in state court was held to have tolled the running of the limitation period with respect to a later suit brought in federal court after the state proceeding had been dismissed for improper venue.[12]

This case admittedly differs from *American Pipe* and *Burnett* in that the right asserted by petitioner before the Commission had a different statutory origin from the one he is now attempting to vindicate. But the fact that the plaintiffs were in each case merely reasserting a single statutory right for the second time was not critical to the Court's analysis in *American Pipe* and *Burnett;* the Court's decisions in those cases rested upon its conclusion that each plaintiff had by his prior action given the defendant timely notice in a manner that "fulfilled the policies of repose and certainty inherent in the limitation provisions and tolled the running of the period." *American Pipe & Construction Co.* v. *Utah, supra,* 414 U.S. at 558. When the right first asserted has a different statutory origin from that which forms the basis for a subsequent request for relief, the question under *American Pipe* and *Burnett* would appear to be whether the two distinct statutory rights are essen-

[12] This Court concluded that an equitable tolling principle, rather than the state savings statute, should control the timeliness of the second action in *Burnett*, in order that the federal statute of limitation for FELA suits would operate uniformly throughout the nation. 380 U.S. at 434–436.

tially equivalent in substance, so that a claim under one rests upon the same facts as, and gives notice of the existence of, a claim under the other. See *Berry* v. *Pacific Sportfishing, Inc.*, 372 F. 2d 213 (C.A. 9), certiorari denied, 389 U.S. 821 (holding that the running of the three-year limitation period under the Jones Act is tolled during the pendency of a state wrongful death action). See also *Sanchez* v. *Trans World Airlines, Inc.*, 499 F. 2d 1107 (C.A. 10); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (C.A. 7); *Malone* v. *North American Rockwell Corp.*, 457 F. 2d 779 (C.A. 9); and *Culpepper* v. *Reynolds Metals Co.*, 421 F. 2d 888 (C.A. 5) (all holding that resort to the grievance-arbitration provisions of a collective bargaining agreement tolls the running of the limitation period under Title VII).

As we have shown above (pp. 9–14, *supra*), claims of racially discriminatory employment practices under Section 1981 and Title VII are essentially equivalent in substance. The filing of petitioner's charges under Title VII clearly put respondents on notice that petitioner also had a grievance under Section 1981. Accordingly, that filing, like the initial lawsuits in *American Pipe* and *Burnett*, "fulfilled the policies of repose and certainty inherent in the limitation provisions and tolled the running of the period." *American Pipe & Construction Co.* v. *Utah, supra.*

These considerations led two other courts of appeals in earlier cases to conclude that the filing of Title VII charges of unlawful employment practices with the Commission tolls the running of the limitation period with respect to Section 1981 suits based upon the same

factual allegations. *Macklin* v. *Spector Freight Systems, Inc., supra,* 478 F. 2d at 994, n. 30; *Boudreaux* v. *Baton Rouge Marine Contracting Co.,* 437 F. 2d 1011, 1017, n. 16 (C.A. 5). The court of appeals below erred in not following those decisions.

CONCLUSION

The court of appeals erred in holding that the filing of timely Title VII charges of unlawful employment practices with the Equal Employment Opportunity Commission does not toll the running of the limitation period with respect to Section 1981 suits based upon the same factual allegations.

Respectfully submitted.

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